Supreme Court, U.S.
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No. 06-959

In The

Supreme Court of the United States

CARLOS FLORES, JR.,

Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. To determine the commencement of the one-year statute of limitations under 28 U.S.C. § 2244(d) of the AEDPA, does a state conviction become final when the time for seeking direct review expires or when the state court issues its mandate?

2. Does a District Court abuse its discretion in applying the doctrine of equitable tolling to the AEDPA statute of limitations where the petitioner, to determine the commencement of the limitations period, relied to his detriment on federal and state law that was valid when he filed his state habeas corpus application?

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PETITION FOR A WRIT OF CERTIORARI

Carlos Fl[illegible] Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fourth Court of Appeals of Texas is not reported and is not included in the Appendix because it does not address the present issue. The findings of fact and conclusions of law of the 290th District Court of Bexar County, Texas, are not reported and are not included in the Appendix because they do not address the present issue. The Order of the Texas Court of Criminal Appeals denying habeas corpus relief (Appendix G) is not reported. The first Memorandum and Recommendation of the United States Magistrate Judge (Appendix F), the Amended Order Rejecting the Report and Recommendation of the United States Magistrate Judge (Appendix E), the second Memorandum and Recommendation of the United States Magistrate Judge (Appendix D), the Order Adopting the Memorandum and Recommendation of the United States Magistrate Judge and Denying Plaintiff's Writ of Habeas Corpus (Appendix C), and the Final Judgment (Appendix B) are not reported. The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A) is reported at 467 F.3d 484.

JURISDICTION

The Fifth Circuit affirmed the denial of relief on October 6, 2006. This petition is being filed within 90 days of that decision. This Court has jurisdiction under 28 U.S.C.

§ 1254(1). Petitioner initially invoked federal jurisdiction under 28 U.S.C. § 2254(a).

STATUTORY PROVISION

Title 28, § 2244(d)(1)(A) of the United States Code provides, in pertinent part:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. . . .

STATEMENT OF THE CASE

A. Summary Of The Issues

The Fifth Circuit erred in holding that, to determine the commencement of the one-year statute of limitations under the AEDPA, a state conviction becomes final when the time for seeking direct review expires, rather than when the state court issues its mandate. Under Texas law, a conviction does not become final until the state court issues its mandate, regardless of when the time for seeking direct review expires. A habeas corpus applicant cannot file his state application before the mandate issues or else the state court will dismiss the application because the conviction is not final. There is a conflict among several circuits on whether state law controls when a state conviction becomes final to determine the commencement of the AEDPA statute of limitations. The Fifth Circuit holds that the statute of limitations commences when the

time for seeking direct review expires, regardless of when the mandate issues. This Court should resolve the conflict, as due process does not permit different standards across the nation for determining this important date.

Assuming *arguendo* that the petition was time-barred, the Fifth Circuit also erred in holding that the District Court abused its discretion in applying the doctrine of equitable tolling, where petitioner relied to his detriment on federal and state law that was valid when he filed his state habeas corpus application. When he filed his state application, valid federal and state law supported the proposition that his conviction became final when the state court issued its mandate. In another case, the Fifth Circuit subsequently decided that a state conviction becomes final when the time for seeking direct review expires, regardless of when the mandate issues. Although the law had changed to petitioner's detriment, the District Court applied the doctrine of equitable tolling and considered the merits of his petition because his case presented "rare and exceptional circumstances" that justified equitable tolling. The Fifth Circuit should have deferred to that decision rather than review the issue *de novo*. This Court should decide whether a federal court abuses its discretion when it applies equitable tolling to the AEDPA statute of limitations where a petitioner files an untimely petition because he relies to his detriment on federal and state law that was valid when he filed his state application.

B. Procedural History

Petitioner was charged with murder and deadly conduct. He pled not guilty. A jury convicted him on February 25, 1999, and assessed his punishment at life

imprisonment for murder and ten years for deadly conduct.

The Fourth Court of Appeals affirmed the conviction in an unpublished opinion issued on August 23, 2000. Petitioner did not seek discretionary review from the Texas Court of Criminal Appeals or certiorari from this Court. *Flores v. State*, 2000 WL 1190822, No. 04-99-00373-CR (Tex. App. – San Antonio 2000, no pet.) (unpublished).

Petitioner filed a state habeas corpus application on November 15, 2001. The trial court issued findings of fact and conclusions of law and recommended that relief be denied on November 21, 2002. The Texas Court of Criminal Appeals denied relief on April 2, 2003. *Ex parte Flores*, No. WR-54,456-01 (Tex. Crim. App. 2003) (unpublished).

Petitioner filed a federal habeas corpus petition on December 23, 2002. The Magistrate Judge found that the petition was barred by limitations and recommended that it be dismissed on September 22, 2003. The District Court overruled that recommendation, applied the doctrine of equitable tolling, and remanded the petition to the Magistrate Judge for consideration of the merits on January 29, 2004. The Magistrate Judge recommended that relief be denied on June 30, 2004. The District Court adopted that recommendation and denied the petition on August 31, 2004. The Fifth Circuit held that the doctrine of equitable tolling did not apply and affirmed the judgment without reaching the merits on October 6, 2006. *Flores v. Quarterman*, 467 F.3d 484 (5th Cir. 2006).

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS ERRED IN HOLDING THAT, TO DETERMINE THE COMMENCEMENT OF THE ONE-YEAR STATUTE OF LIMITATIONS UNDER THE AEDPA, A STATE CONVICTION BECOMES FINAL WHEN THE TIME FOR SEEKING DIRECT REVIEW EXPIRES, RATHER THAN WHEN THE STATE COURT ISSUES ITS MANDATE.

A jury convicted petitioner on February 25, 1999. The Fourth Court of Appeals affirmed the conviction on August 23, 2000. He did not seek a petition for discretionary review to the Texas Court of Criminal Appeals. The Court of Appeals issued its mandate on November 17, 2000. He filed a state habeas corpus application on November 15, 2001. It was denied on April 2, 2003. He filed a federal habeas corpus petition on December 6, 2002, while the state application was pending.

Respondent filed a motion to dismiss the petition as time-barred pursuant to the one-year statute of limitations in 28 U.S.C. § 2244(d). He argued that the state conviction became final on September 22, 2000, 30 days after the Court of Appeals affirmed petitioner's conviction, when the time to seek discretionary review in the Texas Court of Criminal Appeals expired. This interpretation is based on 28 U.S.C. § 2244(d)(1)(A), which directs that a state conviction is final at "the expiration of the time for seeking such review." Petitioner filed his state habeas corpus application almost two months after this date. Accordingly, respondent urged that the state application that petitioner filed did not toll the federal statute of limitations.

Petitioner asserted that his state conviction did not become final until the Fourth Court of Appeals issued its mandate on November 17, 2000, because a direct appeal is final under Texas law when the court of appeals issues its mandate. *See Ex parte Johnson*, 12 S.W.3d 472 (Tex. Crim. App. 2000). Had he filed his state habeas corpus application before the mandate issued, it would have been premature and subject to dismissal. *Id.* at 473. When he filed his state application on November 15, 2001, the Fifth Circuit had not resolved when a state conviction becomes final for the purpose of determining the commencement of the AEDPA statute of limitations. No federal district court in Texas had published an opinion addressing this issue, although most of the district courts had held that the finality of a state conviction is determined pursuant to state law – when the mandate issues.[1] Most important, there was a split among the federal circuit courts that had addressed the issue. *Compare Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001) (holding that, under Florida law, state conviction becomes final when state court of appeals issues mandate, and that date will be used to determine commencement of statute of limitations under 28 U.S.C. § 2244(d)(1)(A)); *with Wixom v. Washington*, 264 F.3d 894, 897-98 (9th Cir. 2001) (rejecting application of

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[1] *See Royale v. Cockrell*, 2001 WL 1148946, No. 3:01-CV-1063-X, at *3 (N.D. Tex. Sept. 18, 2001); *Howard v. Johnson*, 2001 WL 720489, No. 3:00-CV-2032-P, at *2 (N.D. Tex. June 21, 2001); *Rose v. Johnson*, 2001 WL 880689, No. 3:01-CV-0386-M, at *1 (N.D. Tex. June 21, 2001); *Hunt v. Johnson*, 2001 WL 484191, No. 3:01-CV-0578-M, at *1 (N.D. Tex. May 3, 2001); *Sledge v. Johnson*, 2001 WL 456236, No. 3:01-CV-145-H, at *2 (N.D. Tex. April 26, 2001); *but see Mott v. Johnson*, 2001 WL 671476, No. 3:01-CV-0171-R, at *2 (N.D. Tex. June 12, 2001) (holding that state conviction became final 30 days after court of appeals rendered judgment).

Washington law, which views state conviction as final when mandate issues, to determine commencement of AEDPA statute of limitations). Accordingly, when petitioner filed his state habeas corpus application, valid federal and state law supported the proposition that his conviction became final when the state court issued its mandate.

After petitioner filed his state application, the Fifth Circuit decided *Roberts v. Cockrell*, 319 F.3d 690 (5th Cir. 2003), which held that a state conviction becomes final when the time for seeking direct review expires, regardless of when the state court issues its mandate. The *Roberts* Court applied the rule retroactively to the petitioner in that case. Accordingly, by the time the state court denied habeas relief and petitioner proceeded to federal court, the law had changed adversely to him.

The Magistrate Judge found that the petition was barred by limitations and recommended that it be dismissed. The District Court overruled that recommendation, applied the doctrine of equitable tolling, and remanded the petition to the Magistrate Judge for consideration of the merits. The Magistrate Judge recommended that relief be denied. The District Court adopted that recommendation and denied the petition. The Fifth Circuit held that the doctrine of equitable tolling did not apply and affirmed the judgment without reaching the merits.

At issue is whether, to determine the commencement of the one-year statute of limitations under the AEDPA, state or federal law dictates when a state conviction becomes final. The circuits are split on this important question. The Eleventh Circuit has held that state law controls when a

state conviction becomes final. *Tinker v. Moore*, *supra*. The Fifth and Ninth Circuits have held that federal law controls and the statute of limitations commences when the time for seeking direct review expires, regardless of when the state court issues its mandate. *Roberts v. Cockrell*, *supra*; *Wixom v. Washington*, *supra*. Due process cannot permit different standards for determining this important issue. This Court should grant certiorari to resolve the conflict among the circuits. SUP. CT. R. 10(a).

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN APPLYING THE DOCTRINE OF EQUITABLE TOLLING WHERE PETITIONER, TO DETERMINE THE COMMENCEMENT OF THE LIMITATIONS PERIOD, RELIED TO HIS DETRIMENT ON FEDERAL AND STATE LAW THAT WAS VALID WHEN HE FILED HIS STATE HABEAS CORPUS APPLICATION.

When petitioner filed his state habeas corpus application, valid federal and state law supported the proposition that his conviction became final when the state court issued its mandate. The state application was filed within one year of the day that the mandate issued, so the federal petition would have been timely filed had the statute of limitations commenced that day. Thereafter, the Fifth Circuit decided *Roberts v. Cockrell* and applied its rule retroactively to the petitioner in that case. Accordingly, by the time the state court denied habeas relief and petitioner proceeded to federal court, the law had changed and his federal petition was time-barred pursuant to controlling circuit law.

The District Court applied the doctrine of equitable tolling and considered the merits of the habeas corpus petition because petitioner had relied to his detriment on federal and state law that was valid when he filed his state application. That law authorized a federal habeas corpus petitioner to conclude that his state conviction does not become final – and the AEDPA statute of limitations does not commence – until the state court issues its mandate. The District Court recognized that petitioner faced a dilemma. If he filed his state application before the mandate issued, the state court would have dismissed the application under *Ex parte Johnson* because his conviction was not yet final. Petitioner would have been procedurally barred from federal review of his habeas claims because he would not have exhausted his state court remedies since the state court would not have considered the merits of his application. Instead, he followed state law and waited until the mandate issued so there would be no doubt about the finality of his conviction and so the state and federal courts would consider the merits of his habeas claims.

The Fifth Circuit held that the District Court abused its discretion in applying the doctrine of equitable tolling and considering the merits of the petition. It concluded that petitioner should have been aware of the circuit split and the conflicting, unpublished district court opinion from June of 2001 and should have erred on the side of caution by following the earlier of the two possible deadlines. It also observed that, even if petitioner had waited until the mandate issued to file the state application, almost ten months remained to file it before the earlier deadline.

Equitable tolling of the AEDPA statute of limitations applies only in "rare and exceptional circumstances." *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). A federal habeas court "must examine each case on its facts to determine whether it presents sufficiently 'rare and exceptional circumstances' to justify equitable tolling," but it "must be cautious not to apply the statute of limitations too harshly." *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). A petitioner has the burden of proving that he is entitled to equitable tolling. *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000). The decision whether to equitably toll the statute of limitations is left to the District Court's discretion and is reviewed by the Court of Appeals for abuse of discretion. *Fisher v. Johnson*, 174 F.3d at 713.

Assuming *arguendo* that petitioner's conviction became final when the time to seek discretionary review expired and the petition was time-barred, the Fifth Circuit erred in holding that the District Court abused its discretion in applying the doctrine of equitable tolling. The Fifth Circuit should have deferred to that decision rather than review the issue *de novo*. As this Court recently observed in *Day v. McDonough*, ___ U.S. ___, 126 S.Ct. 1675 (2006), a federal district court has the discretion to decide whether the administration of justice is better served by dismissing a case on statute of limitations grounds or by reaching the merits of a petition. Petitioner's delay was based on federal and state law that was valid when he filed his state application. His decision to file it when he did was not based on a misunderstanding or lack of knowledge of the law. There would have been serious, adverse consequences had he filed the application before the mandate issued. Moreover, he was entitled to one year

to file his federal petition, not ten months as the Fifth Circuit would have it. The District Court observed that the petition was a substantial document with many exhibits that raised complex factual issues and would have taken a significant amount of time to prepare. He diligently pursued relief based on his understanding of the law when he filed his state application, which was based on valid federal and state law at the time. The Fifth Circuit should have deferred to the District Court's decision that petitioner was entitled to equitable tolling. The Fifth Circuit's analysis does not demonstrate that the District Court abused its discretion.

Petitioner's case presents the "rare and exceptional circumstances" that permit application of the doctrine of equitable tolling. The Fifth Circuit's conclusion to the contrary is a departure from the accepted and usual course of judicial proceedings and presents an important issue of federal law that has not been, but should be, settled by this Court. Accordingly, this Court should grant certiorari to decide whether a federal court abuses its discretion when it applies equitable tolling to the AEDPA statute of limitations where a petitioner files an untimely petition because he relies to his detriment on federal and state law that was valid when he filed his state application. SUP. CT. R. 10(a) and (c).

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari, vacate the judgment of the Fifth Circuit, and remand for consideration of the merits of the appeal.

Respectfully submitted,

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APPENDIX A

467 F.3d 484

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-51062

CARLOS FLORES, JR.,

Petitioner-Appellant,

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas

(Filed October 6, 2006)

Before BARKSDALE, BENAVIDES and OWEN, Circuit Judges.

PER CURIAM:

Carlos Flores, Jr., appeals the district court's denial of relief on his 28 U.S.C. § 2254 petition. We affirm the district court's judgment on grounds that Flores' § 2254 petition is barred by the one-year statute of limitations found in 28 U.S.C. § 2244(d).

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On February 25, 1999, a jury found Flores guilty of the felony offenses of murder and deadly conduct. The court of appeals affirmed Flores' conviction on August 23, 2000. He did not seek a petition for discretionary review. The court of appeals issued its mandate on November 17, 2000. Flores waited until November 15, 2001, to file his state habeas application, which was denied on April 2, 2003. He filed his federal habeas petition December 6, 2002, while the state application was still pending, and the respondent filed a motion to dismiss Flores' application as time-barred pursuant to the one-year statute of limitations found in 28 U.S.C. § 2244(d).

Respondent argued that the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review on September 22, 2000, thirty days after the court of appeals affirmed Flores' conviction, which constituted the date on which Flores could not seek further direct review.[1] Because the period for Flores to timely file a habeas application therefore expired on September 22, 2001, the state application he filed on November 15, 2001, had no tolling effect. The district court invoked equitable tolling, reached the petition's merits, and denied relief. Flores now appeals the district court's denial of relief.

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[1] Texas Rule of Appellate Procedure 68.2 provides that a petition for discretionary review must be filed within 30 days after the day the court of appeals' judgment was rendered or the day the last timely motion for rehearing was overruled by the court of appeals.

II. STANDARD OF REVIEW

We review the district court's decision to invoke equitable tolling for an abuse of discretion. *Cousin v. Lensing,* 310 F.3d 843, 848 (5th Cir. 2002). A court abuses its discretion when it makes an error of law. *United States v. Riggs,* 314 F.3d 796, 799 (5th Cir. 2002).

III. DISCUSSION

In *Roberts v. Cockrell,* we held that a state conviction becomes final when the time for seeking direct review expires, regardless of when the state court issues its mandate. 319 F.3d 690, 694 (5th Cir. 2003). Under *Roberts,* Flores' conviction became final on September 22, 2000, thirty days after the court of appeals affirmed the trial court's judgment.[2] *Roberts* had not yet been decided when Flores filed his application,[3] however, and some uncertainty existed at that time as to when a conviction is made final for purposes of the § 2244(d) statute of limitations. Under Texas law, a direct appeal is final when the court of appeals issues its mandate. *See Ex Parte Johnson,* 12 S.W.3d 472, 473 (Tex. Crim. App. 2000). In contrast,

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[2] While the filing of a state habeas application ordinarily tolls the federal one-year statute of limitations, Flores did not file his state application until November 15, 2001 – more than one year after his sentence became final, and almost two months after the statute of limitations expired. *See Scott v. Johnson,* 227 F.3d 260, 263 (5th Cir. 2000) (holding that state applications filed after expiration of limitations period do not toll limitations period).

[3] If the holding in a case is applied retroactively to the parties in that case, it must be applied retroactively to the parties in other cases. *See Sterling v. Block,* 953 F.2d 198, 199 (5th Cir. 1992). We applied the holding of *Roberts* to the parties therein and affirmed the dismissal of the § 2254 petition as time-barred; the holding of *Roberts* is thus also retroactively applicable to Flores.

§ 2244(d)(1)(A) directs that a conviction is final at "the expiration of the time for seeking [discretionary] review."

A split existed among circuits as to whether federal or state law controlled the issue at the time Flores filed his petition.[4] There was also disagreement among the district courts of this Circuit.[5] It is understandable that Flores' counsel may have believed that his conviction was not final until the court of appeals issued its mandate. *See Roberts,* 319 F.3d at 693 ("The assertion that we should look to state law to determine when a state conviction is final is not without support."). At the time of Flores' correct application deadline, September 22, 2001, the district courts in the Northern District of Texas were not in agreement.

The Fifth Circuit had not yet spoken on the issue, none of the district courts had issued published opinions, and the most recent federal appellate opinion, *Wixom v.*

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[4] *See, e.g., Tinker v. Moore,* 255 F.3d 1331, 1333 (11th Cir. 2001) (holding that under Florida law, issuance of mandate on direct appeal makes criminal judgment final, and that that date will be used for purposes of § 2244(d)(1)(A)). *But see Wixom v. Washington,* 264 F.3d 894, 897-98 (9th Cir. 2001) (rejecting, for purposes of § 2244(d)(1)(A), use of Washington state law which views issuance of mandate as making conviction final).

[5] *See Mott v. Johnson,* No. 3:01-CV-0171-R, 2001 WL 671476, at *2 (N.D. Tex. June 12, 2001) (stating that petitioner's conviction became final thirty days after court of appeals rendered judgment). *But see Royale v. Cockrell,* No. 3:01-CV-1063-X, 2001 WL 1148946, at *3 (N.D. Tex. Sept. 18, 2001) (stating that "finality of a judgment is determined pursuant to state law" which holds that judgment does not become final until mandate has issued); *Howard v. Johnson,* No. 3:00-CV-2032-P, 2001 WL 720489, at *2 (N.D. Tex. June 21, 2001) (same); *Rose v. Johnson,* No. 3:01-CV-0386-M, 2001 WL 880689, at *1 (N.D. Tex., June 21, 2001) (same); *Hunt v. Johnson,* No. 3:01-CV-0578-M, 2001 WL 484191, at *1 (N.D. Tex., May 3, 2001) (same).

Washington, held that federal law controlled. 264 F.3d at 897-98. The question was certainly not settled.

Equitable tolling of the one-year limitations period is appropriate only in "rare and exceptional circumstances." *Felder v. Johnson,* 204 F.3d 168, 170-71 (5th Cir. 2000) (internal quotation marks and citations omitted). We have previously "made it clear that a lack of knowledge of the law, however understandable it may be, does not ordinarily justify equitable tolling." *Fierro v. Cockrell,* 294 F.3d 674, 683 (5th Cir. 2002). Flores' counsel should have been aware of the circuit split, as well as the conflicting district court case three months earlier. Despite the handful of district court cases to the contrary, it was still unclear whether state or federal law controlled; Flores should have elected to err on the side of caution and abide by the earlier of the two possible deadlines. *See Fierro,* 294 F.3d at 683 (stating that "such uncertainty should have militated *against* taking an unnecessary risk by waiting to file a motion for authorization and habeas petition").

This Court, "and the district courts, guided by precedent, must examine each case on its facts to determine whether it presents sufficiently 'rare and exceptional circumstances' to justify equitable tolling." *Fisher v. Johnson,* 174 F.3d 710, 713 (5th Cir. 1999). "Equitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." *Coleman v. Johnson,* 184 F.3d 398, 402 (5th Cir. 1999) (citation omitted). Nothing in the record suggests that Flores' situation was unique for the purposes of

equitable tolling, nor that the state or court in any way prevented him from asserting his rights.[6]

The district court based its decision to invoke equitable tolling on the premise that Flores faced a dilemma between filing his state habeas application within the one-year limitations period, and exhausting his claims in state court. While it is true that, under Texas law, a state habeas application filed before the issuance of the court of appeal's mandate is premature and is subject to dismissal without prejudice, *see Ex Parte Johnson,* 12 S.W.3d at 473, the court of appeals issued its mandate on November 17, 2000, leaving Flores nearly ten months in which to file his habeas application. Rather than placing Flores "in a bind," as the district court thought, ten months was ample time for him, with the assistance of counsel, to compose a habeas petition for filing in state and federal court. *See Fisher,* 174 F.3d at 715 (pro se petitioner who was incapacitated when placed in psychiatric ward for seventeen days not entitled to equitable tolling where he still had over six months to complete his federal habeas petition after his return to his usual quarters). Rather than diligently pursuing his relief, however, Flores waited until November 15, 2001 – only two days shy of what he thought was the deadline – to file for state habeas relief. *See*

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[6] It is true that we have invoked equitable tolling when a federal district court order unintentionally misled a petitioner into believing that a subsequent federal writ petition would not be time-barred. *United States v. Patterson,* 211 F.3d 927, 931 (5th Cir. 2000). We also did not find an abuse of discretion when a district court concluded this Court similarly could have misled a petitioner into believing that a subsequent federal writ petition would not be time-barred. *Alexander v. Cockrell,* 294 F.3d 626, 629-30 (5th Cir. 2002). However, both cases, unlike here, concerned orders or opinions directed at the particular petitioner.

Coleman, 184 F.3d at 403 ("In order for equitable tolling to apply, the applicant must diligently pursue his § 2254 relief.").

In the absence of "rare and exceptional circumstances," the district court abused its discretion in invoking equitable tolling where Flores, in the face of uncertainty as to which date to abide by, elected the later date.

Given that Flores' petition was time-barred, we do not reach the merits of Flores' claims of ineffective assistance of counsel.

IV. CONCLUSION

For the foregoing reasons, we affirm the district court's judgment on grounds that Flores' § 2254 petition is barred by the one-year statute of limitations.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CARLOS FLORES, JR.	§	
	§	
v.	§	
	§	
DOUG DRETKE, Director,	§	
Texas Department of	§	NO. SA-02-CA-1163-RD
Criminal Justice,	§	
Correctional Institutions	§	
Division	§	

FINAL JUDGMENT

(Filed Aug. 31, 2004)

It is ORDERED that the Memorandum and Recommendation of United States Magistrate Judge John Primomo, filed on June 30, 2004, recommending that the application for writ of habeas corpus of Plaintiff Carlos Flores, Jr., be denied, is hereby ADOPTED IN ITS ENTIRETY.

It is ORDERED that the Plaintiff's Application for Writ of Habeas Corpus is hereby DISMISSED WITH PREJUDICE.

It is ORDERED that the parties shall bear their own costs.

SIGNED this 31st day of August, 2004.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CARLOS FLORES, JR. Plaintiff, v. DOUG DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Defendant.	§ § § § § § § § § § §	No. SA-02-CA-1163-RF (Filed Aug. 31, 2004)

ORDER ADOPTING THE MEMORANDUM AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE AND DENYING PLAINTIFF'S WRIT OF HABEAS CORPUS

BEFORE THE COURT is Memorandum and Recommendation of U.S. Magistrate Judge John Primomo, filed on June 30, 2004, recommending that the writ of habeas corpus, filed by counsel on behalf of Carlos Flores, Jr., be denied. The Plaintiff in this case is an inmate in the custody of the Texas Department of Criminal Justice-Correctional Institutions Division (TDCJ-CID) who challenges his state court convictions for murder and deadly conduct on the basis of ineffective assistance of counsel. The case comes before the Court on objections filed respectively by Defendant and Plaintiff on July 20 and 28 to the Memorandum and Recommendation of Magistrate Judge Primomo. The Magistrate Judge recommended that Plaintiff's Application for Writ of Habeas Corpus be denied for failure to prove ineffective assistance of

counsel – Plaintiff's sole basis for challenging his state court conviction. Having given due consideration to the Magistrate Judge's Memorandum and Recommendation, and after reviewing the complete file, including the subsequently filed objections, this Court is of the opinion that the habeas petition should be DENIED.

BACKGROUND

On February 3, 1999 Flores was found guilty by a jury in the 290th Judicial District Court of Bexar County, Texas, of murder and of deadly conduct in shooting at a van, cause no. 98CR3286. He was sentenced to life in prison for murder, and to ten years in the TDCJ-CID for deadly conduct. On August 23, 2000, his convictions were affirmed by the Texas Fourth Circuit of Appeals. Flores did not file a petition for discretionary review with the Texas Court of Criminal Appeals. On November 15, 2001, Flores filed a state habeas application, under Article 11.07 of the Texas Code of Criminal Procedure. On April 2, 2003, the Texas Court of Criminal Appeals denied the petition, based upon findings of the trial court. On December 23, 2002 Flores filed his federal habeas petition, claiming that his trial attorneys rendered ineffective assistance by failing to interview witnesses, neglecting to use impeachment material, failing to hire experts, failing to offer exculpatory evidence, misunderstanding the law, and failing to object to improper and prejudicial evidence and argument. On September 22, 2003, the Magistrate Judge entered a Memorandum and Recommendation ordering Plaintiff's habeas writ be dismissed for expiration of the statute of limitations. On January 20, 2004, this Court rejected the Memorandum and Recommendation, allowing for equitable tolling. Subsequent briefs were filed, and on

June 30, 2004 Magistrate Judge Primomo issued a second Memorandum and Recommendation in keeping with the previous order of this Court.

Standard of Review

The Court reviews *de novo* a Magistrate Judge's Memorandum and Recommendation if a party files specific objections within ten days of service.[1] In the instant case, Defendant and Plaintiff filed timely objections to the Magistrate Judge's Memorandum and Recommendation.[2] Defendant's objections can be summarized as disagreeing with the Magistrate Judge's characterizations of several of the prosecution's strategic decisions during trial. Specifically, the Defendant requests the Court find that the trial attorneys were concerned with angering or offending the jury, and that Flores misconstrued the prosecutor's argument in several instances. Plaintiff's [sic] takes objection to the following findings of the Magistrate Judge: (1) Plaintiff and/or his family were consulted by counsel and agreed to counsel's actions; (2) all potential witnesses were interviewed by counsel; (3) counsel's decision not to call certain witnesses and counsel's failure to object were not prejudicial; (4) lack of expert testimony was irrelevant; (5) the State habeas court's finding of "isolated failures of counsel to object" should be upheld; and (6) the State habeas court's determination is not "contrary to and did not involve an unreasonable application of clearly-established federal law."[3] Because specific objections were

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[1] 28 U.S.C. § 636(b)(1).

[2] Docket No. 13.

[3] Pet.'s Objections pp 1-5.

filed, the Court reviews the Memorandum and Recommendation *de novo.*

Standard of Review [sic]

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state prisoner may not obtain relief with respect to a claim adjudicated on the merits in state court unless the adjudication (1) resulted in a decision that was contrary to or involved an unreasonable application of clearly-established federal law, as announced by the Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.[4] A decision is contrary to clearly-established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts.[5] A habeas petition can be granted only if the correct legal principle was unreasonably applied by the state courts to the facts of the Plaintiff's case.[6]

ANALYSIS

To obtain habeas relief on the basis of ineffective assistance of counsel, the Plaintiff must demonstrate that his counsel was deficient and that the deficiency prejudiced his defense.[7] A convicted defendant carries the

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[4] 28 U.S.C. § 2254(d).

[5] *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000).

[6] *Id.* at 413.

[7] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

burden of proof and must overcome a strong presumption that the conduct of counsel at trial falls within a wide range of reasonable professional assistance.[8] The courts make every effort to eliminate the distorting effects of hindsight, and in doing so are extremely deferential in scrutinizing the performance of counsel.[9] "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[10] Deficiencies in counsel's performance must be prejudicial to constitute ineffective assistance of counsel under the Constitution.[11] A plaintiff must prove that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair.[12] In evaluating a claim of ineffective assistance during the guilt phase of the trial, a plaintiff must show a "reasonable probability" that the jury would have otherwise harbored a reasonable doubt concerning guilt.[13]

ISSUE OF CALLING OR INTERVIEWING WITNESSES

Flores concedes that, on February 28, 1998, he fired a shot at the van occupied by Steven Felan but claims that Joe Travino [sic] shot and killed Creeks. He claims that two witnesses, Mario Inouye and Jose Buentello would

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[8] *Id.* at 689-91.

[9] *Strickland*, 466 U.S. at 689.

[10] *Id.* at 691.

[11] *Id.* at 692.

[12] *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

[13] *United States v. Mullins*, 315 F.3d 449, 456 (5th Cir. 2002).

have testified that Trevino shot Creeks, but counsel failed to call Inouye and failed to interview Buentello. According to Flores, counsel also failed to interview Victor Vogt, who also would have testified he saw Trevino with a pistol after Creeks was shot.

Complaints against counsel for uncalled witnesses are not favored.[14] To prove prejudice from counsel's failure to call certain witnesses, a Plaintiff must identify those witnesses and establish, by affidavit or otherwise, what those witnesses would have testified to at trial.[15] Flores has attached an affidavit from Inouye in which he attests to seeing Trevino walk up to Creeks and shoot him in the chest, to having made defense counsel aware of that fact, and to being prepared to testify at Flores's trial.[16] As for Buentello, Plaintiff included in his Petition an affidavit from a private investigator who states that Buentello told him he saw Trevino shoot Creeks in the chest.[17] Vogt has provided an affidavit indicating that he saw Trevino with a pistol in the waist of his pants walking from the area where Creeks was shot, that he made defense counsel aware of that fact, and that he was prepared to testify at Flores' trial.[18]

In its findings on Flores's state habeas petition, the State trial court found that Flores's counsel, Juan Aguilera and Jesse Botello, fully investigated the case, interviewed all available witnesses, and made tactical decisions,

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[14] *Sayre v. Anderson*, 238 F.3d 631, 635-36 (5th Cir. 2001).

[15] *Id.*

[16] Petition for Writ of Habeas Corpus, exh. 5.

[17] *Id.*, exh. 6.

[18] *Id.*, exh. 7.

after consultation with Flores and his family about whether such witnesses would be called to testify. Although Plaintiff now objects to this finding, the State court considered affidavits from Aguilera and Botello and found credible their testimony that they chose not to call certain individuals as witnesses because the witnesses were not credible, would be disbelieved by the jury, and would place a pall on the entire defense. These determinations by a State court are presumed to be correct, and the applicant bears the burden of rebutting the presumption of correctness by clear and convincing evidence.[19] Flores has not met that burden.

Aguilera states that the persons Flores offered to the defense to prove that Trevino shot Creeks either did not confirm that fact when interviewed by counsel or would have made poor witnesses due to lack of knowledge or poor presentation. Botello testified that no credible witness ever stated that he saw Trevino shoot Creeks. Because credibility of witnesses was a crucial factor in the jury verdict, counsel made the decision to call as witnesses only those persons whose testimony concerning the events were consistent. In his affidavit, Botello explains why the decisions were made not to call Inouye, Buentello, and Vogt as witnesses.[20] Such tactical and strategic decisions of counsel, based on

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[19] 28 U.S.C. § 2254(e)(1).

[20] For example, Inouye did not tell the police that Trevino shot Creeks; Buentello refused to be interviewed by counsel; and Vogt, who insisted that he be interviewed outside the presence of Flores and Flores's father, stated that he had not really seen a lot concerning the shooting and did not want to get involved. Some of the witnesses who were not called were aware that Flores carried a concealed handgun without a permit and made incriminating statements about his involvement in Creeks's shooting.

informed and reasoned practical judgment, will not be second-guessed.[21]

Flores also asserts that counsel failed to lay a proper foundation for admission of Trevino's confession to Rick Romero that he shot someone. Allegedly, the confession could have been offered as an excited utterance or as a statement against Trevino's penal interest. In his affidavit, Aguilera points out that the trial court sustained the State's objection to his attempt to solicit such testimony from Romero. Flores has failed to establish that counsel could have done more to introduce Romero's testimony. Furthermore, Oscar Alonzo was permitted testify that Trevino told him he shot Creeks. Flores was thus not prejudiced by the fact that the jury did not hear Romero testify similarly.

STATE'S THEORY AND FAILURE TO HIRE EXPERT WITNESS

Flores claims that counsel failed to challenge the State's theory that only two shots were fired at the departing van driven by Felan and Creeks in quick succession and, thus, insufficient time elapsed for Flores to shoot at the van, and then give the gun to Trevino to shoot Creeks. Plaintiff states that counsel failed to interview another witness, Eric Contreras, who would have testified that he heard two to three shots at the van, and then two more thereafter. Flores contends that yet another witness, Gilbert Pardo, would have testified that he heard one shot, then two more in quick succession a minute later. Lastly, Plaintiff asserts that counsel failed to impeach two of the

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[21] *Ransom v. Johnson*, 126 F.3d 716, 721 (5th Cir. 1997).

prosecution's witnesses, Richard Escamilla and Robert Vela, who allegedly gave prior inconsistent statements concerning the number and timing of the shots they heard.

Defendant notes that, in his affidavit, Botello claims Flores misperceives the theories of the State and the defense regarding the rapidity of the shooting. Botello indicates that whether two or three shots were fired, the shooting occurred at such a pace that Flores did not have time to give the gun to Trevino. Thus, the testimony of Contreras would not have helped the defense. Botello states that Pardo's testimony could have hurt the defense because it was not consistent with Flores's assertion that Trevino returned the gun to him after the shooting. Aguilera testified that Contreras's testimony concerning the number of shots was actually more consistent with the State's evidence.

Aguilera also states that a conscious decision was made not to impeach Escamilla because his first statement, that he saw Flores shoot Creeks, changed to seeing Flores shoot at the van, hearing a shot, and seeing Creeks hit the ground. Thus, his second statement was less inculpatory and was not inconsistent with the defense theory that Trevino did the shooting. Botello assets [sic] that Flores has taken Vela's testimony out of context and cannot demonstrate how he was prejudiced if Vela heard one shot or two.

Flores believes that his attorneys bolstered the credibility of Escamilla and Vela by eliciting and [sic] inadmissible opinion from police officer Robert Blanton that he believed their statements were true and correct. Both Aguilera and Botello testify that they permitted Officer Blanton to so testify because it showed that he was willing to accept any

statement that would correlate with his belief that Flores was the shooter, even when Escamilla had changed his initial statement. Counsel's intent, in effect, was to undermine Officer Blanton's credibility to the jury. The same strategy was employed with regard to Detective Matjetka's testimony that two witnesses made credible hearsay statements that Flores was the shooter. As noted above, the prudence of these tactical and strategic decisions will not be second-guessed.[22]

Flores also contends that a crime scene reconstruction expert could have benefitted the defense to disprove the prosecution's theory that Flores ejected both shells found near Creek's body. The expert's opinion is that a third shell was ejected from Flores's gun, which would have been in keeping with Flores's assertion that he fired at the van, but then gave the weapon to Trevino, who fired the fatal shot. In the State habeas proceedings, Aguilera states that he went to the crime scene several times to ascertain distances and lighting conditions. He also states the expert opinion is based solely on facts provided by Flores and were inconsistent with two magazines of ammunition, each with an eighteen-round capacity found in the vehicle in which Flores departed the crime scene. Furthermore, Botello confirms in his affidavit that the conclusions of the expert concerning the number of shots fired did not address the defense strategy that Trevino had time to borrow Flores's gun to shoot Creeks. Again, such tactical and strategic decisions will not be second guessed.[23]

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[22] *Ransom*, 126 F.3d at 721.

[23] *Id.*

FAILURE TO OBJECT

Flores alleges that counsel failed to object to inadmissible hearsay testimony of Officer Blanton that a security guard told him someone fired a shot at him from the vehicle Flores and three other men used to leave the crime scene. Flores further asserts that counsel should have requested a limiting instruction for the security guard's testimony.

The State habeas court found that the record reflected isolated failures of counsel to object when an objection would have been appropriate. The specific instances are not identified. However, the court determined that Flores had not demonstrated that counsel's performance was ineffective in the constitutional sense. This conclusion is substantiated by the record. As Botello notes, no one identified Flores as the individual in the vehicle that fired a shot at the security guard, therefore no harm occurred even if counsel was remiss in failing to object to the testimony. Botello further stated that Officer Blanton's reference to the security guard's description clearly related to the murder, not the shot fired from the car. Thus, there was no need for a limiting instruction.

Flores next claims counsel failed to object when the prosecution asked a witness about a business card found in Flores's possession which referred to a professional assassin. He also argues further that counsel also should have objected to testimony from a police officer that cocaine, a large amount of cash, and an unrelated weapon with ammunition were found in the vehicle in which Flores and three other men left the scene. In addition, Flores contends that testimony of his outstanding traffic

warrants at the time of his arrest was wrongly allowed to proceed without objection.

The Court agrees that counsel should have objected when the prosecutor initially read from the card. However the witness, Rick Romero, stated that it was a joke. It is not likely that such evidence had any significant bearing on the jury's verdict. When the State eventually admitted the card into evidence, it was over defense counsel's objection. Thus, any harm that may have occurred was not attributable to Flores's attorneys. Defense counsel did object to several other areas of testimony, which were all overruled. Finally, assuming counsel should have objected to the cash and cocaine, no harm was shown because there was no evidence that they belonged to Flores. There was also no prejudice shown regarding the outstanding traffic warrants.

Flores also alleges that counsel failed to object to improper closing argument by the prosecutor. Those statements included personal feelings about the defendant, alleged drug use of the defendant that lacked an evidentiary basis, and alleged fear of witnesses at the scene who refused to speak with detectives. The affidavits of Botello and Aguilera do not address this complaint. The State habeas court found that counsel failed to make some objections, but the Flores's constitutional right to effective assistance of counsel was not violated.

In evaluating a claim of ineffective assistance of counsel during the guilt phase of the trial, the Plaintiff must show a "reasonable probability" that the jury would have otherwise harbored a reasonable doubt concerning

guilt.[24] The jury was aware that Flores was in possession of a weapon at the crime scene and fired a shot at the van. Police found two spent shell casings on the ground near Creek's body, which came from a 9mm gun purchased by Flores, and found in the car in which Flores left the crime scene and was arrested. A bullet underneath Creek's body, a fragment of which was taken from his body, was also fired from that gun. As found by the State habeas court, counsel's performance was not deficient in most respects, and Flores has not shown the necessary prejudice by the instances when objections should have been made, but were not.

All of Flores's remaining contentions, each of which was thoroughly addressed by the Magistrate Judge, was either not prejudicial to the defense, or was explained by counsel as a tactical and strategic decision. For example, Flores complains that his lawyer failed to object to evidence from Creek's sister of his background and good character, and then urged in closing argument that the jury not do an injustice to his grieving relatives. Counsel note that the atmosphere in the courtroom was emotionally charged and an objection to a grieving relative's testimony about Creek's character could have angered members of the jury. These tactical choices are afforded great deference.

Conclusion

The Court has reviewed the complete file, as well as the Magistrate Judge's Memorandum and Recommendation denying Plaintiff's writ of habeas corpus. The Court

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[24] *Mullins*. 315 F.3d at 456.

agrees with the Magistrate Judge that Plaintiff's writ should be denied, on the basis of Plaintiff failing to prove constitutionally ineffective representation of counsel. Accordingly, the Court ORDERS that the Memorandum and Recommendation be ADOPTED IN ITS ENTIRETY.

Signed this 31st day of August, 2004.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CARLOS FLORES, JR.,	*	
Petitioner,	*	
v.	*	
DOUGLAS DRETKE,	*	**CIVIL NO.**
Director, Texas Department of Criminal Justice,	*	**SA-02-CA-1163-RF**
Correctional Inst. Division,	*	
Respondent.	*	

MEMORANDUM AND RECOMMENDATION

(Filed Jun. 30, 2004)

In this application for a writ of habeas corpus, filed by counsel pursuant to 28 U.S.C. Section 2254, Carlos Flores, Jr., an inmate in the custody of the Texas Department of Criminal Justice – Correctional Institutions Division (TDCJ-CID), challenges his state court convictions for murder and deadly conduct. Flores alleges that he received ineffective assistance of counsel. Having considered the petition, the response, and the applicable law, the Court is of the opinion this habeas petition should be denied.

Background

On February 25, 1999, Flores was found guilty by a jury in the 290th Judicial District Court of Bexar County, Texas of the murder of Laderek Creeks and of deadly conduct in shooting at a van driven by Steven Felan, cause no. 98CR3286. He was sentenced to life in prison for

murder and to 10 years in the TDCJ-CID for deadly conduct. His convictions were affirmed by the Texas Fourth Court of Appeals on August 23, 2000. Flores did not file a petition for discretionary review with the Texas Court of Criminal Appeals. He did file a state habeas application under Article 11.07 of the Texas Code of Criminal Procedure on November 15, 2001. The Texas Court of Criminal Appeals denied the petition on April 2, 2003 based upon the findings of the trial court. Flores claims that his trial attorneys rendered ineffective assistance by failing to interview witnesses, neglecting to use impeachment material, failing to hire experts, failing to offer exculpatory evidence, misunderstanding the law, and failing to object to improper and prejudicial evidence and argument.

Standard of Review

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state prisoner may not obtain relief with respect to a claim adjudicated on the merits in state court unless the adjudication (1) resulted in a decision that was contrary to or involved an unreasonable application of clearly-established federal law, as announced by the Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. **Title 28 U.S.C. Section 2254(d)**. A decision is contrary to clearly-established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. ***Williams v. Taylor***, 529 U.S. 362, 405-06 (2000). It is not enough that

the state court applied clearly-established federal law incorrectly. ***Id.*** at 411. Habeas relief can be granted only if the correct legal principle was unreasonably applied by the state courts to the facts of the petitioner's case. ***Id.*** at 413.

Analysis

To obtain habeas relief on a claim of ineffective assistance of counsel, the petitioner must demonstrate that his counsel was deficient and that the deficiency prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In order to establish that his counsel's performance was constitutionally deficient, a convicted defendant carries the burden of proof and must overcome a strong presumption that the conduct of his trial counsel falls within a wide range of reasonable professional assistance. ***Id.*** at 689-91. The courts are extremely deferential in scrutinizing the performance of counsel and make every effort to eliminate the distorting effects of hindsight. ***Id.*** at 689.

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." ***Strickland***, 466 U.S. at 691. "Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." ***Id.*** at 692. The mere possibility of a different outcome is not sufficient to prove prejudice. ***Johnson v. Cockrell***, 301 F.3d 234, 239 (5th Cir. 2002). The petitioner must prove that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. ***Lockhart v. Fretwell***, 506 U.S. 364, 372 (1993). In evaluating a claim of ineffective assistance

during the guilt phase of the trial, the petitioner must show a "reasonable probability" that the jury would have otherwise harbored a reasonable doubt concerning guilt. ***United States v. Mullins***, 315 F.3d 449, 456 (5th Cir. 2002).

1. Implication of Joe Trevino

Flores concedes that, on February 28, 1998, he fired a shot at the van occupied by Steven Felan but claims that Joe Trevino shot and killed Creeks. He claims that Mario Inouye and Jose Buentello could have testified that Trevino shot Creeks, but his attorney failed to call Inouye as a witness and failed to even interview Buentello. According to Flores, his attorney also failed to interview Victor Vogt who could have testified that he saw Trevino with a pistol in his pants after Creeks was shot.

Complaints based upon uncalled witnesses are not favored. ***Sayre v. Anderson***, 238 F.3d 631, 635-36 (5th Cir. 2001). To prove prejudice from counsel's failure to call certain witnesses, a petitioner must identify those witnesses and establish, by affidavit or otherwise, what those witnesses would have testified to at trial. ***Id.*** To satisfy this burden, Flores has attached an affidavit from Mario Inouye in which he attests that he saw Trevino walk up to Creeks and shoot him in the chest, that he made defense counsel aware of that fact, and that he was prepared to testify at Flores' trial. **Petition for a Writ of Habeas Corpus, exh. 5.** Also included is an affidavit from a private investigator who states that Buentello told him he saw Trevino shoot Creeks in the chest. **Id., exh. 6**. Vogt has provided an affidavit indicating that he saw Trevino with a pistol in the waist of his pants walking from the

area where Creeks was shot, that he made defense counsel aware of that fact, and that he was prepared to testify at Flores' trial. **Id., exh. 7.**

In its findings on Flores' state habeas petition, the State trial court found that Flores' counsel, Juan Aguilera and Jesse Botello, fully investigated the case, interviewed all available witnesses, and made tactical decisions, after consultation with Flores and his family, about whether such witnesses would be called to testify. The State court considered affidavits from Aguilera and Botello and found credible their testimony that they chose not to call certain individuals as witnesses because the witnesses were not credible, would be disbelieved by the jury, and would place a pall on the entire defense. Such determinations of fact made by a State court are presumed to be correct, and the applicant bears the burden of rebutting the presumption of correctness by clear and convincing evidence. **Title 28 U.S.C. Section 2254(e)(1).** Flores has not met that burden.

In their affidavits, Aguilera and Botello testify that all witnesses proposed by Flores were interviewed. Because credibility of the witnesses was the crucial factor in the jury's verdict, counsel made the decision to call as witnesses only those persons whose testimony concerning the events was consistent. Aguilera states that the persons who Flores offered to prove that Trevino shot Creeks either did not confirm that fact when interviewed by counsel or would have made poor witnesses due to lack of knowledge or poor presentation. Botello testifies that no credible witness ever stated that he saw Trevino shoot Creeks. In his affidavit, Botello thoroughly explains why

the decisions were made not to call Inouye, Buentello, and Vogt as witnesses.[1] The attorneys state that Flores and his family made recommendations concerning the suitability of witnesses and approved all tactical decisions. Such tactical and strategic decisions of counsel, based on informed and reasoned practical judgment, will not be second-guessed. ***Ransom v. Johnson***, 126 F.3d 716, 721 (5th Cir. 1997).

Flores also asserts that his attorney failed to lay a proper foundation for admission of Trevino's confession to Rick Romero that he shot someone. Allegedly, the confession could have been offered as an excited utterance or as a statement against Trevino's penal interest. In his affidavit, Aguilera points out that the trial court sustained the State's objection to his attempt to solicit such testimony from Romero. Flores has failed to establish that counsel could have done more to introduce Romero's testimony. In any event, as Aguilera notes, Oscar Alonzo was permitted to testify that Trevino told him he shot Creeks. Flores was not prejudiced by the fact the jury did not hear Romero testify similarly; the jury heard the alleged confession but chose not to believe it.

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[1] For example, Inouye did not tell the police that Trevino shot Creeks, Buentello refused to be interviewed by counsel, and Vogt, who insisted that he be interviewed outside the presence of Flores and Flores' father, stated that he had not really seen a lot concerning the shooting and did not want to get involved. Some of the witnesses who were not called were aware that Flores carried a concealed handgun without a permit and made incriminating statements about his involvement in Creeks' shooting.

2. State's Theory

Flores claims that his counsel failed to challenge the State's theory that only two shots were fired at the departing van driven by Felan and Creeks in quick succession and, thus, insufficient time elapsed for Flores to shoot at the van and then give the gun to Trevino to shoot Creeks. He states that his attorneys failed to interview Eric Contreras who would have testified that he heard 2-3 shots at the van and then two more shots thereafter. Flores contends that Gilbert Pardo would have testified that he heard one shot , then two more shots fired in quick succession a minute later. He argues that his attorneys failed to impeach Richard Escamilla and Robert Vela with prior inconsistent statements concerning the number and timing of the shots they heard. He asserts that the prior inconsistent statements of Escamilla and Vela and the testimony of Contreras and Pardo would have discredited the State's theory.

Respondent notes that, in his affidavit, Botello points out that Flores misperceives the theories of the State and the defense regarding the rapidity of the shooting. Botello indicates that whether two or three shots were fired, the shooting occurred at such a pace that Flores did not have time to give the gun to Trevino. Thus, the testimony of Contreras would not have helped the defense. Botello states that Pardo's testimony could have hurt the defense because it was not consistent with Flores' assertion that Trevino returned the gun to him after the shooting. Aguilera testified that Contreras's testimony concerning the number of shots was actually more consistent with the evidence from the State's witnesses.

Aguilera also states that a conscious decision was made not to impeach Escamilla because his first statement – that he saw Flores shoot Creeks – changed to he saw Flores shoot at the van, heard a shot, and saw Creeks hit the ground. Thus, his second statement was less inculpatory and was not inconsistent with the defense theory that Trevino did the shooting. Botello testifies that Flores has taken Vela's testimony out of context and cannot demonstrate how he was prejudiced whether Vela heard one shot or two.

Flores states that his attorneys bolstered the credibility of Escamilla and Vela by eliciting an inadmissible opinion from police officer Robert Blanton that he believed their statements were true and correct. Both Aguilera and Botello testify that they permitted Officer Blanton to so testify because it showed that he was willing to accept any statement that would correlate with his position that Flores was the shooter, even when Escamilla had changed his initial statement to that effect. Counsels' intent was to undermine Officer Blanton's credibility to the jury. Similarly, Flores' claim that his lawyers "opened the door" for Detective Thomas Matjetka to testify that two witnesses made credible hearsay statements to him that Flores was the shooter, was intended to show that the hearsay statements were made without investigation or corroboration, strengthening defense counsels' position that such statements were taken at face value by police who made no effort to locate any other shooter. As noted above, such tactical and strategic decisions of counsel cannot be second-guessed. ***Ransom***, 126 F.3d at 721.

Flores also contends that, according to Edward Hueske, a crime scene reconstruction expert, counsel could have used the testimony of such an expert to conclusively disprove the prosecution's theory that Flores ejected both of the shells found near Creek's body. In Hueske's opinion, a third shell not recovered by police must have been ejected from Flores' gun. It is Flores' theory that he fired at the van and then gave the weapon to Trevino who fired a shot that missed Creeks and then fired the shot that killed him, after which Trevino returned the weapon to him.

In its findings, the State habeas court determined that the proposed expert evidence was "barely relevant and certainly inconclusive." This conclusion is presumed to be correct and is supported by the attorneys' testimony to the State habeas court. In his affidavit, Aguilera states that he went to the crime scene on more than one occasion to ascertain distances and lighting conditions. He states that the hiring of an expert to determine the number of shots that were fired would not have provided more information. He indicates that the opinion of Edward Hueske was based upon facts provided by Flores and failed to account for the two magazines of ammunition, each with an 18-round capacity, found in the vehicle in which Flores departed the crime scene and was arrested. Aguilera testifies that there were conflicting statements concerning the amount of shots fired, and that the number of people at the scene made a realistic determination as to the amount of shots impossible. In his affidavit, Botello confirms that the conclusions of the expert concerning the number of shots fired did not address the defense strategy that Trevino had time to borrow Flores' gun to shoot Creeks.

3. Failure to Object

Flores alleges that his counsel failed to object to inadmissible hearsay testimony of Officer Blanton that a security guard, Max Castillo, told him that someone fired a shot at him from the vehicle Flores and three other men used to leave the crime scene. He also contends that, after Officer Blanton testified that Castillo was unable to identify the individual who shot at him, Flores' attorney asked what his report reflected about a description of the shooter, whereupon Officer Blanton provided the description of an individual which fit Flores. Flores asserts that his attorneys should have requested a limiting instruction for the security guard's testimony.

In its findings, the State habeas court concluded that the record reflected isolated failures of counsel to object when an objection would have been appropriate. The specific instances are not identified. However, in evaluating the totality of the circumstances, the court determined that Flores had not demonstrated that his counsels' performance was ineffective in the constitutional sense. This conclusion is substantiated by the record. As Botello notes, no one identified Flores as the individual in the vehicle that fired a shot at the security guard. Therefore, even if counsel was remiss in failing to object to the security guard's testimony in that regard, no harm occurred. Botello further states that Officer Blanton's reference to the security guard's description of the shooter clearly related to the murder, not the shot fired from the car. There was no need for a limiting instruction.

Flores next claims that his attorney failed to object when the prosecution asked a witness about a business card found in Flores' possession which refers to Carlos

Begante, professional assassin. He argues that counsel should also have objected to testimony from a police officer that cocaine, a large amount of cash, and a weapon with ammunition (unconnected to the Creeks' shooting) were found in the vehicle in which Flores and three other men left the scene. Flores also claims that his attorney should have objected to testimony that he was subject to outstanding traffic warrants when he was arrested for the murder.

This Court agrees that counsel should have objected when the prosecutor initially read from the assassin card. However, the witness, Rick Romero, stated that the card was a joke. It is not likely that such evidence had any bearing on the jury's verdict. In any event, the State court eventually admitted the card into evidence over defense counsels' objection. Thus, if any harm did occur, it would not be attributable to Flores' attorneys.

Counsel did object to testimony concerning the pistol and bullets found in the car but the objection was overruled. Although counsel did not object to testimony concerning the cocaine and cash, no evidence indicates that they belonged to Flores. The cocaine was found on Buentello, and the cash was found in the glove compartment. Thus, assuming counsel should have objected to the cash and cocaine, no harm has been shown. Assuming also that counsel should have objected to Flores' outstanding traffic warrants, the Court agrees with Aguilera and Botello that it did not prejudice Flores.

Flores contends that his attorneys erred in failing to object to questions by the prosecutor to impeach Johnny DeLaRosa, a defense witness, by showing that he had violated probation by being at the bar and concerning his

membership in a gang. As noted by Botello, and as Flores concedes, DeLaRosa could have been asked about the underlying conviction for burglary of a vehicle, so it made no difference that his sentence of probation was discussed. Aguilera notes that the strategy was intended to enhance DeLaRosa's credibility by showing that he was willing to risk his situation. Because DeLaRosa denied that he was a member of a gang, that reference also did not harm Flores.

Flores complains that his lawyer failed to object to evidence from Creeks' sister of his background and good character and then urged, in closing argument, that the jury not do an injustice to his grieving relatives. Flores asserts that the inadmissible evidence was used to counter an unattractive picture of Creeks who quickly gulped the equivalent of 7 shots of liquor, angered Flores' friends by shouting for a lady in their group to take her clothes off, and aggressively engaged in a heated verbal confrontation with them when he could have safely retreated. Aguilera and Botello note that the atmosphere in the courtroom was emotionally charged and an objection to a grieving relative's testimony about Creeks' good character could have angered Creeks' family. Aguilera notes that such an objection would not have conformed to the defense contention that Trevino committed the murder; that theory made Creeks' character irrelevant. He also points out that the request that the jury not do an injustice was to suggest to the jury that one family had lost a child and that another family should not lose a child for a crime he did not commit. These tactical choices are entitled to substantial deference.

Finally, Flores alleges that counsel failed to object to improper closing argument by the prosecutor. He states that his attorney did not object when the prosecutor told

the jury he would not prosecute someone he believes is innocent, that he cared about the Creeks' family, that hundreds of witnesses at the scene were afraid to speak with detectives, that Flores was using cocaine, that DeLa-Rosa's failure to tell police that he saw Trevino shoot Creeks could not be explained by his fear of Trevino, and referred to Creeks' race.

The affidavits of Botello and Aguilera do not address this complaint. In his answer, respondent points out that the prosecutor did not argue that Flores used cocaine. However, respondent does not deny that counsel did not object to the other matters. Again, as noted above, the State habeas court found that counsel failed to make some proper objections but that Flores' constitutional right to the effective assistance of counsel was not violated. This Court agrees that, even if counsels' performance in failing to object to these matters during closing argument was deficient, that failure did not cause the result of the trial to be unreliable or the proceeding fundamentally unfair. ***See Lockhart***, 506 U.S. at 372.

In evaluating a claim of ineffective assistance during the guilt phase of the trial, the petitioner must show a "reasonable probability" that the jury would have otherwise harbored a reasonable doubt concerning guilt. ***Mullins***, 315 F.3d at 456. The jury was aware that Flores was in possession of a weapon at the crime scene and fired a shot at Felan's van. Monica Laurel testified that she saw Flores point a gun at Creeks and, as she turned to run inside, heard a gunshot. She turned back and saw that Creeks was down. She heard the gunshot two seconds after she saw Flores pointing the gun at Creeks. Police found two spent shell casings on the ground near Creeks' body, which casings came from a 9mm gun purchased by

Flores, and found in the car in which Flores left the crime scene and was arrested. A bullet underneath Creeks' body, a fragment of which was taken from his body, was also fired from that gun. As found by the State habeas court, counsels' performance was not deficient in most respects, and Flores was not prejudiced by the instances when objections should have but were not [sic]. Thus, there is no reasonable probability that but for the isolated errors of Flores' counsel, the jury would have harbored a reasonable doubt concerning his guilt. The determination by the State habeas courts that Flores was not denied the effective assistance of counsel, is not contrary to and did not involve an unreasonable application of clearly-established federal law.

Recommendation

It is, therefore, the recommendation of the Magistrate Judge that Flores' Section 2254 habeas application be **DENIED**.

Instructions for Service and Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties either (1) by certified mail, return receipt requested, or (2) by facsimile if authorization to do so is on file with the Clerk. Pursuant to Title 28 U.S.C. Section 636(b)(1) and Rule 72(b), Fed.R.Civ.P., any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the district court. A party filing objections must

specifically identify those findings, conclusions, or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. ***Such party shall file the objections with the clerk of the court and serve the objections on all other parties and the magistrate judge***. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a ***de novo*** determination by the district court. ***See Thomas v. Arn***, 474 U.S. 140, 150 (1985). Additionally any failure to file written objections to the proposed findings, conclusions and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. ***Douglass v. United Services Automobile Association***, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

SIGNED this 30th day of June, 2004.

/s/ **John W. Primomo**
JOHN W. PRIMOMO
United States Magistrate Judge

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CARLOS FLORES, JR., Petitioner,	§	
v.	§	No. SA-02-CA-1163-RF
DOUGLAS DRETKE, Director Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§	

AMENDED ORDER REJECTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

(Filed Jan. 29, 2004)

BEFORE THE COURT is the Report and Recommendation of the United States Magistrate Judge, filed September 22, 2003. The Magistrate Judge recommended to deny Petitioner's Application for a Writ of Habeas Corpus. Plaintiff filed objections to the Report and Recommendation on October 3, 2003. After due consideration, the Court is of the opinion that Plaintiff's objections should be ADOPTED and that the Magistrate Judge's Report and Recommendation should be REJECTED.

I. Background

In his habeas application, Petitioner challenges his state court convictions for murder and deadly conduct. The

Magistrate Judge recommended to dismiss Petitioner's habeas application as time-barred on the basis of the holding in *Roberts v. Cockrell*, that is, that the AEDPA statute of limitations runs from when the time for filing for discretionary review with the Court of Criminal Appeals lapses, not from the date the state court of appeals issued its mandate. Petitioner's convictions were affirmed by the Texas Fourth Court of Appeals on August 23, 2000. Petitioner did not file a discretionary appeal with the Court of Criminal Appeals, thus Petitioner's state habeas application was due on September 22, 2001. Petitioner filed his state habeas application on November 15, 2001, past the one-year deadline allowed for filing habeas applications under the AEDPA. Petitioner claimed that his attorney calculated the start of the statute of limitations from the day the state court of appeals issued its mandate, November 17, 2001. Under that date, petitioner filed his habeas application within one year. Petitioner asked the Court to equitably toll the statute of limitations in light of his attorney's error. Petitioner claims the attorney error is understandable and triggers equitable tolling as the *Roberts* decision was handed down after Petitioner filed his habeas application in federal court.

II. Discussion

A. Standard of Review for Report and Recommendation

The Court reviews *de novo* a Magistrate Judge's Report and Recommendation if a party files specific objections within ten days of service.[1] The Local Court Rules for the Western District of Texas require that the

[1] 28 U.S.C. § 636(b)(1).

"written objections . . . specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections."[2] Thus, the Court need not consider objections that are frivolous, conclusive, or general in nature.[3] If there are no specific objections to a Magistrate Judge's Report and Recommendation, the District Court is to review it for findings and conclusions that are either clearly erroneous or contrary to law.[4] In the instant case, Plaintiff filed objections to the Magistrate Judge's Report and Recommendation.

B. Objections

Petitioner made thirteen objections total. Petitioner's objections are one sentence long and do not contain any analysis. The Court interprets objections one through eight and twelve, as objecting to the Magistrate's rejection of Plaintiff's request to equitably toll the statute of limitations. Objections nine through eleven challenge the retroactive application of the *Roberts* decision. Objection thirteen is conclusory and will not be addressed by the Court.[5]

The Court will first address the retroactivity of the *Roberts* decision. The *Roberts* court did not explicitly address the retroactivity of the decision. However, the *Roberts* court applied the rule retroactively to the

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[2] W.D.TEX.R. 4(b) at App. C ("Assignment of Duties to United States Magistrate Judges").

[3] *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir.1987).

[4] *See United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.1989).

[5] *See supra*, at 2-3.

petitioner in the *Roberts* case. Thus, it seems clear to this Court that the *Roberts* court intended the decision to be retroactive. Furthermore, the Northern District of Texas has held the *Roberts* decision is retroactive.[6] Therefore, Petitioner's Objections to the retroactivity of the *Roberts* decision are denied. However, while the Court finds that the *Roberts* decision is retroactive, the Court also finds that the effects of the retroactive application of *Roberts* in this case weigh in favor of equitably tolling the statute of limitations.

Equitable tolling of the statute of limitations provided for in 28 U.S.C. § 2254 occurs in "rare and exceptional cases."[7] The Fifth Circuit has held that " '[e]quitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights.' "[8] Petitioner bears the burden of proof to show he is entitled to equitable tolling.[9] The decision whether to equitably toll the statute of limitations is left to the district court's discretion, and as such is reviewed for abuse of discretion.[10]

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[6] *Pinson v. Cockrell*, 2003 WL 21685607, at *2 (N.D. Tex. 2003).

[7] *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1995); *see also Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999) (asserting that courts must "examine each case on its facts to determine whether it presents sufficiently 'rare and exceptional circumstances' to justify equitable tolling" (quoting *Davis*, 158 F.3d at 811)).

[8] *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir. 1999) (quoting *Rashidi v. American President Lines*, 96 F.3d 124, 128 (5th Cir. 1996)).

[9] *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000).

[10] *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999).

The Magistrate Judge found that equitable tolling was not appropriate in this case because the Magistrate found that petitioner's attorney's belief as to the start of the statute of limitations is no more than excusable neglect and thus not grounds for equitable tolling.[11] The Magistrate stated that ignorance of or unfamiliarity with the AEDPA time limit does not warrant equitable tolling.[12] Furthermore, the Magistrate held that Petitioner had not diligently pursued habeas relief because Petitioner waited just under one year after the mandate was issued by the court of appeals to file a habeas application.[13]

First, the Court disagrees that Petitioner's attorney's understanding of the statute of limitations amounts to nothing more than excusable neglect. While it is correct that Petitioner's attorney was not "misled by respondent or any state agent"[14] regarding the statute of limitations, Petitioner relied, to his detriment, on federal and state law that was good at the time Petitioner filed.

The attorney who filed Petitioner's post-conviction petition has died since the petition was filed. Therefore, though there is evidence Petitioner's counsel thought the AEDPA statute of limitations began to run from the date the mandate issued, it is not possible for the Court to

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[11] Magistrate's Rep. and Rec., at 4.

[12] Magistrate's Rep. and Rec., at 5.

[13] *Id.* Despite waiting almost the entire year allotted under the AEDPA to file the habeas application in state court, the Petitioner did not exceed the one-year timeline if calculated from the date the mandate issued. Petitioner filed his habeas application in federal court before the state court denied his habeas application.

[14] *Id.*, at 4.

know why Petitioner's counsel thought that.[15] However, at the time Petitioner's habeas application was filed, Texas federal district courts were ruling that the AEDPA statute of limitations began on one of two days, either the date the court of appeals issued its mandate, or the date upon which the time for filing an appeal to the Court of Criminal Appeals passed.[16] Texas federal district courts held that either date was acceptable because, under *Ex Parte Johnson*,[17] Texas state courts dismissed habeas applications filed before the court of appeals issued its mandate on the grounds that the judgment was not final. A requirement to receiving federal review of a habeas application is that the petitioner first received merits review of the claims in the habeas application by a state court.[18]

Petitioner was in a bind. Had petitioner filed his habeas application within the time period stated by the *Roberts* court, he would have filed his habeas application before the state court of appeals issued its mandate. Under *Ex Parte Johnson*, the state court would have dismissed his application on the ground that Petitioner's conviction was not yet final.[19] Because the state court would not have heard Petitioner's claims on the merits, Petitioner would be procedurally barred from review in

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[15] Pet's Resp. to Resp's Mot. to Dismiss, at 2.

[16] *See, e.g., Royale v. Cockrell*, 2001 WL 1148946, at *3 (N.D.Tex.2001); *Howard v. Johnson*, 2001 WL 720489, at *2 (N.D.Tex. 2001); *Rose v. Johnson*, 2001 WL 880689, at *1 (N.D.Tex., 2001); *Hunt v. Johnson*, 2001 WL 484191, at *1 (N.D.Tex.,2001); *Sledge v. Johnson*, 2001 WL 456236 (N.D.Tex.2001).

[17] 12 S.W.3d 472 (Tex.Crim.App. 2000).

[18] 28 U.S.C. § 2254(b)(1)(A).

[19] *See Id.*

federal court on the ground that Petitioner had not exhausted his state remedies.[20]

In order for Petitioner to exhaust his claims in state court, Petitioner had to wait until the state court of appeals issued its mandate making his conviction final under *Ex Parte Johnson*. Only then would the state courts be able to hear Petitioner's habeas application on the merits. However, by waiting for the state court to issue its mandate, Petitioner missed the statute of limitations of § 2254 as interpreted by the *Roberts* court. Thus, petitioner is again procedurally barred from having the merits of his application heard by this Court; in this instance, on the grounds that he missed the statute of limitations.

Petitioner faced a procedural bar from merits review for failing to exhaust his claims as required by 28 U.S.C. § 2254, or a procedural bar for missing the statute of limitations as required by 28 U.S.C. § 2254. Petitioner, with no viable course for merits review, followed the law at the time he filed his habeas application.[21] Years after he filed his habeas application, the Fifth Circuit told Petitioner that he made the wrong decision. Therefore, the Magistrate is correct that there was no state action preventing Petitioner from filing his habeas application earlier. However, Petitioner filed his habeas application in accordance with both state and federal law from the state

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[20] *See Moye v. Johnson*, 2001 WL 671473 (N.D.Tex.,2001).

[21] *See, e.g., Royale v. Cockrell*, 2001 WL 1148946, at *3 (N.D.Tex. 2001); *Howard v. Johnson*, 2001 WL 720489, at *2 (N.D.Tex. 2001); *Rose v. Johnson*, 2001 WL 880689, at *1 (ND.Tex., 2001); *Hunt v. Johnson*, 2001 WL 484191, at *1 (N.D.Tex.,2001); *Sledge v. Johnson*, 2001 WL 456236 (N.D.Tex.2001).

in which his application was filed. This is not a case of excusable neglect.

Furthermore, the Court finds the instant case distinguishable from *Fierros v. Cockrell*,[22] in which the Fifth Circuit stated that it is "clear that a lack of knowledge of the law, however understandable it may be, does not ordinarily justify equitable tolling."[23] In *Fierros* the Fifth Circuit found that it was not an abuse of discretion for a district court to deny equitable tolling to a petitioner who believed that a mistakenly believed that [sic] motion in the Fifth Circuit "for authorization to file a successive habeas petition effectively initiated the federal habeas proceeding and thus satisfied the one-year statute of limitations – notwithstanding that a habeas petition must be filed in the district court, not in the court of appeals."[24] The Court concluded "that equitable tolling is not appropriate because Fierro's failure to file his habeas petition within the applicable limitations period is attributable solely to his mistaken assumption that the statute of limitations did not apply to his petition."[25]

The *Fierro* [sic] case is distinguishable from the instant one in numerous ways. First, the *Fierros* Court stated that "the record reflects no other practical or legal reason that would have prevented Fierro from filing his federal petition during the applicable limitations period."[26] In the instant case, state law mandated that Petitioner

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[22] 294 F.3d 674 (5th Cir. 2002).

[23] *Fierros*, 29 F.3d at 683.

[24] *Fierros*, 29 F.3d at 680.

[25] *Fierros*, 29 F.3d at 683.

[26] *Fierros*, 29 F.3d at 683.

wait until the state court of appeal issued its mandate before filing a habeas petition.[27] Thus, in the instant case there was a legal reason that prevented Petitioner from filing within the applicable limitations period.

Second, in *Fierros*, the Fifth Circuit stated that "neither the state nor the district court made affirmative representations regarding the running of the AEDPA limitations period."[28] However, in the instant case, both the state and federal courts affirmatively held that the statute of limitations ran from the date the state court of appeals issued its mandate.[29]

The petitioner in *Fierros* also argued that the statute of limitations should be equitably tolled for his case because he filed his petition in accordance with the district court's scheduling order, which was requested by the state. The Fifth Circuit found that the district court's order could not have affected petitioner's belief of the proper understanding of the statute of limitations because the applicable limitations period passed three weeks before the state requested the scheduling order. "Thus, the state's request and the district court's order could not have contributed to Fierro's failure to comply with the one-year statute of limitations."[30] In this case, it is clear that both state and federal law not just contributed to, but was the sole cause of, Petitioner's failure to timely file.

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[27] *See supra*, at 4, n.15.

[28] *Fierros*, 29 F.3d at 683.

[29] *See supra*, at 4, n.15.

[30] *Fierros*, 29 F.3d at 683.

The Court also disagrees with the Magistrate's finding on diligence. The Court interprets Respondent's argument as stating that if Petitioner were diligently pursuing relief, Petitioner would have filed his application long before the deadline for filing, as Petitioner understood it, and therefore been properly filed under the deadline as subsequently interpreted. In other words, had Petitioner filed his application soon after being denied by the state courts on direct appeal, instead of using the majority of the one-year period, Petitioner's misunderstanding of the date of the onset of the statute of limitations would not be an issue.

Habeas applications are complex factual documents based on a highly technical area of the law.[31] While many non-capital habeas applications are short and lack complex legal analysis, Petitioner's habeas application is a substantial document with numerous exhibits attached, and would have taken a significant amount of time to put together. Petitioner's counsel believed the one year statute of limitations for his habeas application began the day the state court of appeals issued its mandate. Allowing for the time the habeas application was tolled pending state court review, Petitioner filed his habeas application in federal court within the one-year period allowed by the statute of limitations calculated from the issuance of the mandate. The Application was timely filed under the law at the time Petitioner filed, at least as understood by Petitioner and

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[31] *See Edwards v. Carpenter*, 529 U.S. 446, 454 (2000) (Breyer, J., concurring in judgment) discussing (the "complexity of this Court's habeas corpus jurisprudence – a complexity that in practice can deny the fundamental constitutional protection that habeas corpus seeks to assure." *Id.*)

numerous Texas federal district courts.[32] The Court thus finds Petitioner made a diligent effort to comply with the statute of limitations as explicated by federal courts in the state in which he filed.

Accordingly, the Court ORDERS that the Report and Recommendation be OVERRULED.

It is further ORDERED that Respondent's Motion to Dismiss be DENIED.

It is farther ORDERED that the case be remanded for further proceedings consistent with this opinion.

Signed this 29th day January, 2004.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

[32] *See supra*, n. 21.

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CARLOS FLORES, JR.,	*	
Petitioner,	*	
v.	*	**CIVIL NO.**
DOUGLAS DRETKE,	*	**SA-02-CA-1163-RF**
Director, Texas Department of Criminal Justice, Correctional Inst. Division,	*	
Respondent.	*	

MEMORANDUM AND RECOMMENDATION

(Filed Sep. 22, 2003)

In this application for a writ of habeas corpus, filed by counsel pursuant to Title 28 U.S.C. Section 2254, Carlos Flores, Jr., an inmate in the custody of the Texas Department of Criminal Justice – Correctional Institutions Division (TDCJ-CID), challenges his state court convictions for murder and deadly conduct. Within his answer (docket no. 19), respondent has filed a motion to dismiss, alleging that this petition was filed after the limitations period set by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Flores, through counsel, has responded. (Docket no. 23). Having considered the motion and the applicable law, the Court is of the opinion this habeas petition should be dismissed.

Background

On February 25, 1999, Flores was found guilty by a jury in the 290th Judicial District Court of Bexar County,

Texas of murder and deadly conduct, cause no. 98CR3286. He was sentenced to life in prison for murder and to 10 years in the TDCJ-CID for deadly conduct. His convictions were affirmed by the Texas Fourth Court of Appeals on August 23, 2000. Flores did not file a petition for discretionary review with the Texas Court of Criminal Appeals. He did file a state habeas application under Article 11.07 of the Texas Code of Criminal Procedure on November 15, 2001. The Texas Court of Criminal Appeals denied the petition on April 2, 2003. This Section 2254 petition was filed December 23, 2002.

Analysis

Under the AEDPA, a one-year period of limitations applies to a Section 2254 application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. **Title 28 U.S.C. Section 2244(d)**. Although the AEDPA describes four different events which could trigger the limitations period, the relevant time, for purposes of this petition, is the date judgment became final.[1] Under Section 2244(d)(1)(A), that event occurred when the time for seeking discretionary review by the Texas Court of Criminal Appeals expired, 30 days after entry of judgment by the court of appeals. ***See*** **Rule 68.2(a), Tex.R.App.P.** Thus, petitioner's judgment became final September 22, 2000; the Section 2254 limitations period began running that day and expired September 22, 2001. Section 2244(d)(2) provides that the limitations period for filing a Section 2254 petition is

[1] The other three triggering events are (1) removal of a government-imposed impediment to filing, (2) recognition or a new right by the Supreme Court, and (3) discovery of the facts in support of the claim.

tolled during the time a properly-filed application for State post-conviction or other collateral review with respect to the same judgment or claim is pending. However, petitioner's state habeas application was filed November 15, 2001, after the expiration of the AEDPA limitations period and, thus, has no bearing upon the time computation in this case. ***Scott v. Johnson***, 227 F.3d 260, 263 (5th Cir. 2000).

Whether petitioner's state habeas petition was filed in time to toll the AEAPA limitations period depends upon a determination of the date petitioner's convictions became final. In ***Roberts v. Cockrell***, 319 F.3d 690, 694 (5th Cir. 2003), our Court of Appeals held that a state conviction becomes final when the time for seeking direct review expires, regardless of when state court issues its mandate. Under ***Roberts***, petitioner's convictions became final September 22, 2000, when the time to seek discretionary review by the Texas Court of Criminal Appeals expired, not in November 2000 when the state court of appeals issued its mandate.

Flores argues that the attorney, Steven C. Losch[2], who represented him in state court on direct appeal and on his state and federal habeas petitions believed that the AEDPA limitations period did not begin to run until the state court of appeals issued its mandate, November 17, 2000 – less than one year from the date on which his state habeas application was filed. He seeks application of the doctrine of equitable tolling in light of his attorney's belief. He also argues that ***Roberts*** was decided in January 2003, long after this federal petition was filed. He states that it

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[2] Mr. Losch died May 3, 2003.

would constitute a violation of due process to retroactively apply that holding to this case.

These contentions do not warrant relief from the expiration of the AEDPA limitations period. The AEDPA limitations period is akin to a statute of limitations, rather than a jurisdictional bar, and is, thus, subject to equitable tolling. ***Davis v. Johnson***, 158 F.3d 806, 811 (5th Cir. 1998). However, it will be tolled only in rare and exceptional circumstances. ***Id.*** Equitable tolling applies principally when the petitioner is actively misled by the respondent about his cause of action or is prevented in some extraordinary way from asserting his rights. ***Coleman v. Johnson***, 184 F.3d 398, 402 (5th Cir. 1999). Excusable neglect does not warrant equitable tolling. ***Id.***

Flores does not allege that either he or his attorney was misled by respondent or any State agent regarding the running of the AEDPA statute of limitations. Nor does he claim that extraordinary events precluded him from asserting his rights. At any time after September 22, 2000, and before September 22, 2001, Flores could have filed this Section 2254 petition. He did not. His counsel's apparent belief that the issuance of a mandate by the state court of appeals determined when his state court conviction was final, no matter how reasonable or innocent, constitutes no more than excusable neglect and does not justify equitable tolling. Ignorance of or unfamiliarity with the AEDPA time limit does not warrant equitable tolling. ***Felder v. Johnson***, 204 F.3d 168, 172 (5th Cir. 2000); ***Turner v. Johnson***, 177 F.3d 390, 392 (5th Cir. 1999).

Also, equitable tolling is inappropriate when a petitioner has not diligently pursued Section 2254 relief. ***Coleman v. Johnson***, 184 F.3d 398, 403 (5th Cir. 1999).

In this case, no action was taken to challenge Petitioner's convictions, in either state or federal court, for 15 months after affirmance of the convictions by the state court of appeals. Petitioner's state habeas petition was filed November 15, 2001, just under one year after the mandate was issued by the state court of appeals. Even if counsel believed that the issuance of the mandate was controlling, waiting almost the entire AEDPA limitations period before pursuing a state habeas petition – which would toll that limitations period – demonstrates an absence of due diligence.

Finally, the decision in ***Roberts*** does not result in improper retroactive application of new law. As noted by the Northern District of Texas, the decision in ***Roberts*** did not deprive Flores of any substantive right. ***Pinson v. Cockrell***, 2003 WL 21685607 at *2 (N.D.Tex. 2003). It merely clarified existing law regarding the finality of a state conviction under the AEDPA. ***Id.*** Thus, no basis exists for equitably tolling the limitations period during the time petitioner's attorney believed the convictions were not final for purposes of the AEDPA.

Recommendation

It is, therefore, the recommendation of the Magistrate Judge that this Section 2254 habeas application be **DISMISSED** as untimely.

Instructions for Service and Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties either (1) by certified mail, return receipt requested, or (2)

by facsimile if authorization to do so is on file with the Clerk. Pursuant to Title 28 U.S.C. Section 636(b)(1) and Rule 72(b), Fed.R.Civ.P., any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the district court. A party filing objections must specifically identify those findings, conclusions, or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. ***Such party shall file the objections with the clerk of the court and serve the objections on all other parties and the magistrate judge.*** A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a ***de novo*** determination by the district court. ***See Thomas v. Arn***, 474 U.S. 140, 150 (1985). Additionally any failure to file written objections to the proposed findings, conclusions and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. ***Douglass v. United Services Automobile Association***, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

SIGNED this 22nd day of September, 2003.

/s/ **John W. Primomo**
JOHN W. PRIMOMO
United States Magistrate Judge

APPENDIX G

[SEAL] TEXAS COURT OF CRIMINAL APPEALS
Texas Courts Online

Case # WR-54,456-01 -> Event: ACTION TAKEN

Event Information:

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No. 06-959

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS FLORES,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in holding that, to determine the commencement of the one-year statute of limitations under the AEDPA, a state conviction becomes final when the time for seeking direct review expires, rather than when the state court issues its mandate.

2. Whether the Fifth Circuit erred in holding that the district court abused its discretion in applying the doctrine of equitable tolling.

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RESPONDENT QUARTERMAN'S[1] BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a federal habeas corpus proceeding in which Petitioner Carlos Flores unsuccessfully challenged his presumptively valid state convictions for murder and deadly conduct and the corresponding life sentence and ten-year sentence pursuant to 28 U.S.C. § 2254. In the court below, Flores appealed the district court's rejection of his claims on the merits. However, the court of appeals held that Flores's petition was untimely under the statute of limitations and that the district court abused its discretion in granting equitable tolling. The court of appeals's decisions were correct, and Flores is not entitled to certiorari review.

STATEMENT OF THE CASE

I. Proceedings in State Court

In cause number 98CR3286, in the 290th District Court of Bexar County, Texas, styled *The State of Texas v. Carlos Flores*, Flores was convicted of murder and deadly conduct. Tr[2] at 126-29. On February 25, 1999, the jury assessed punishment of imprisonment for life as to the murder charge, and ten years as to the deadly conduct charge. Tr 126, 128.

Flores's conviction was affirmed in an unpublished opinion by the Fourth Court of Appeals of Texas on August 23, 2000. *Flores v. State*, No. 04-99-00373-CR (Tex. App. — San Antonio 2000, no pet.). Flores did not seek a petition for discretionary review

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1 Respondent Nathaniel Quarterman will be referred to as "the Director."

2 "Tr" refers to the transcript of papers filed in the trial court, followed by the page number(s).

("PDR") to the Texas Court of Criminal Appeals. PA[3] 2a. The court of appeals issued its mandate on November 17, 2000. PA 2a. Flores filed a state habeas corpus application on November 15, 2001, which was denied on April 2, 2003. PA 2a. Flores filed his federal writ petition on December 6, 2002, while his state habeas corpus application was still pending. PA 2a.

II. Proceedings in Federal District Court.

The Director moved that the petition be dismissed as having been untimely filed. PA 2a; R 113; docket entry 19. The magistrate judge recommended that Flores's petition be dismissed as untimely. PA 49a, 53a. The district court overruled the magistrate judge's recommendation. PA 38a, 48a. The district court found that although the petition was untimely, Flores was entitled to equitable tolling. PA 39a-48a. The director then answered on the merits. R 186; docket entry 37. The magistrate judge recommended that the petition be denied. PA 23a, 36a. The district court adopted the magistrate judge's memorandum and recommendation and denied the petition. PA 9a, 22a.

III. Proceedings in the Fifth Circuit.

Flores appealed. PA 1a. The district court granted a certificate of appealability on the merits of some of Flores's claims. R[4] 281; docket entry 48. However, the Fifth Circuit affirmed the judgment without reaching the merits. PA 7a. The Fifth Circuit held that Flores's federal petition was untimely under *Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003), and that the district court abused

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[3] "PA" refers to the appendices to Flores's petition for writ of certiorari, followed by the page number.

[4] "R" refers to the record on appeal to the Fifth Circuit, followed by the page number.

its discretion in granting equitable tolling. PA 2a-7a.

ARGUMENT

I. The First Question Presented for Review — Whether a State Law Definition of "Finality" Controls Over a Federal Statute's Definition of "Finality" — Is Unworthy of the Court's Attention.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10 (West 2006). Flores argues there is a conflict between the Fifth Circuit's opinion in *Roberts v. Cockrell*, 319 F.3d 690 (5th Cir. 2003), and *Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001). Because it is not clear that the aspect of *Tinker* on which Flores relies is still good law in the Eleventh Circuit, it is not clear that there is a conflict between the Fifth Circuit and Eleventh Circuit on the same matter. *See* SUP. CT. R. 10(a). Additionally, the Fifth Circuit's reasoning in *Roberts* was consistent with this Court's opinion in *Clay v. United States*, 537 U.S. 522 (2003). Thus, there is no compelling reason warranting review, and certiorari should be denied.

A. *Tinker v. Moore*

In *Tinker*, the Eleventh Circuit held that the federal writ petition was untimely. *Tinker v. Moore*, 255 F.3d at 1333-34. In determining when the limitations period began, the court stated:

> Under Florida law, a judgment against a criminal defendant becomes final upon issuance of the mandate on his direct appeal. *See Jones v. State*, 602 So.2d 606, 607-08 (Fla. Dist. Ct. App. 1992). Tinker's mandate issued on February 14, 1997, and thus he had until February 13, 1998, to file his § 2254 petition, absent tolling of the limitations period.

Tinker v. Moore, 255 F.3d at 1333. The court offered no rationale for why it chose to use the state-law determination of finality to arrive at the date of finality under 28 U.S.C. § 2244(d)(1)(A).[5]

B. *Roberts v. Cockrell*

In *Roberts v. Cockrell*, 319 F.3d 690 (5th Cir. 2003), the Fifth Circuit determined when a state conviction becomes final for purposes of 28 U.S.C. § 2244(d)(1)(A). The court stated it was not bound by the definition of finality under state law. *Id.* at 693. The court found "no reason to look to state law to determine when a state conviction becomes final for the purposes of § 2244(d)(1)(A)." *Id.* at 694.

C. It is not clear that *Tinker* is still good law in the Eleventh Circuit for the proposition that the state-law definition of "finality" controls the § 2244(d)(1)(A) finality determination, so there is no clear conflict with the Fifth Circuit.

It is not clear to what extent *Tinker* is still good law in the 11th Circuit. In *Bond v. Moore*, 309 F.3d 770 (11th Cir. 2002), the Eleventh Circuit held that a Florida prisoner's conviction did not become final under § 2244(d)(1)(A) until the expiration of the 90-day period for filing a petition for writ of certiorari with the Supreme Court. *See also Nix v. Secretary for the Department of Corrections*, 393 F.3d 1235 (11th Cir. 2004) (Florida prisoner's

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[5] 28 U.S.C. § 2244(d)(1)(A) provides, "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court. The limitation period shall run from the latest of . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."

conviction became final under the Antiterrorism and Effective Death Penalty Act (AEDPA) ninety days after the state appellate court affirmed the judgment). In *Chavers v. Secretary, Florida Department of Corrections*, 468 F.3d 1273 (11th Cir. 2006), the Eleventh Circuit held that "the entry of judgment, and not the issuance of the mandate, is the event that starts the running of time for seeking Supreme Court review, within the meaning of Supreme Court Rule 13.3 and 28 U.S.C. § 2244(d)(1)(A)." *Id.* at 1275. Thus, the Eleventh Circuit now appears to determine finality pursuant to federal law, rather than state law.

Moreover, Florida's appellate system differs from Texas. In Texas, appellate decisions of the intermediate courts of appeals are reviewable by the Texas Court of Criminal Appeals. TEX. CONST. art. V, § 5; TEX. CODE CRIM. PROC. art. 4.04, § 2; TEX. R. APP. P. 66.1. Thus, in Texas, the appellate process for non-death penalty felony convictions moves from a state intermediate court of appeals to the Texas Court of Criminal Appeals to this Court.

In Florida, however, the Florida Supreme Court cannot review a *per curiam* affirmance by the lower appellate court. *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); *Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980). Therefore, the appellate process in Florida moves from the lower appellate court to the United States Supreme Court in some instances and from the lower appellate court to the Florida Supreme Court to the United States Supreme Court in other instances.

The Eleventh Circuit has decided the § 2244(d)(1)(A) finality issue in an appellate-process situation similar to that in Texas. In *Pugh v. Smith*, 465 F.3d 1295 (11th Cir. 2006), the Eleventh Circuit faced a situation similar to Flores's. Pugh's conviction was affirmed by the Georgia Court of Appeals, but Pugh did not seek further direct review. There, the Eleventh Circuit determined that a Georgia prisoner could appeal an intermediate appellate court's

decision affirming a conviction to the Georgia Supreme Court. *Id.* at 1300. The court held that Pugh's conviction became final at the expiration of the 10-day period in which he could have sought review in the Georgia Supreme Court. *Id.* at 1299-1300. The Eleventh Circuit's approach was the same as the Fifth Circuit's in *Roberts*. The Eleventh Circuit examined Georgia law to determine whether Pugh could have sought review in a higher state court. *Id.* at 1300. But, importantly, the court did not examine when a conviction becomes final for state law purposes.

In fact, in determining how resentencing affects the finality of a state judgment of conviction, the Eleventh Circuit noted in another case, "While the interpretation of § 2244 is a matter of federal law, we remain sensitive to state law where appropriate. *See Roberts v. Cockrell*, 319 F.3d 690, 693 (5th Cir. 2003)." *Rainey v. Secretary for the Department of Corrections*, 443 F.3d 1323, 1328 n.6 (11th Cir. 2006).

Thus, it appears that *Tinker* is no longer viable in the Eleventh Circuit for the proposition that the state-law definition of finality controls the § 2244(d)(1)(A) finality determination. Therefore, there is no current conflict, or at least no clear conflict, between the Eleventh Circuit and the Fifth Circuit in this regard.

D. In *Roberts*, the Fifth Circuit correctly held that finality under § 2244(d)(1)(A) is determined by federal law, which is the statue itself.

Flores does not suggest why state law, rather than federal law, should control finality under § 2244(d)(1)(A). The Fifth Circuit's decision in *Roberts* was correct.

In *Clay v. United States*, 537 U.S. 522 (2003), which issued after *Tinker* was decided, this Court addressed finality under 28 U.S.C. § 2255. This Court discussed the differences between § 2255, ¶ 6(a) (federal prisoners) and § 2244(d)(1)(A) (state

prisoners). Section 2255, ¶ 6(a) provides that the limitations period runs from "the date on which the judgment of conviction becomes final." Section 2244(d)(1)(A) provides that the limitations period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." This Court stated:

> [O]ne can readily comprehend why Congress might have found it appropriate to spell out the meaning of "final" in § 2244(d)(1)(A) but not in § 2255. Section 2244(d)(1) governs petitions by state prisoners. In that context, a bare reference to "became final" might have suggested that finality assessments should be made by reference to state-law rules that may differ from the general federal rule and vary from State to State. . . . The words "by conclusion of direct review or the expiration of the time for seeking such review" make it clear that finality for the purpose of § 2244(d)(1)(A) is to be determined by reference to a uniform federal rule.

Clay v. United States, 537 U.S. at 530-31.

Therefore, this Court has recognized that the finality determination is not based on whether a conviction is deemed "final" by state law. Rather, finality is determined by the conclusion of direct review or the expiration of time for seeking such review.[6]

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[6] In other contexts, courts have held that the construction of federal statutes is a question of federal, not state, law. *See, e.g., Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111 (1993) ("whether one has been 'convicted' within the meaning of the gun control statute [18 U.S.C. § 1202(a)(1)] is . . . a question of federal, not state, law" (citation omitted)); *Johnston v. United States*, 85 F.3d 217, 219 (5th Cir. 1996) ("[w]hile substantive state law

Roberts:

> The language of § 2244(d)(1)(A) provides that a decision becomes final "by the conclusion of direct review or the expiration of the time for seeking such review." We previously held that direct review includes a petition for writ of certiorari to the Supreme Court. Therefore, the "conclusion of direct review" is when the Supreme Court

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determines whether a cause of action exists, federal law determines when that claim accrues" for statute of limitations calculation in a suit brought under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (citation omitted)); *Cantu v. Rocha,* 77 F.3d 795, 803 (5th Cir. 1996) ("[w]hether an order is an appealable 'final decision' for purposes of 28 U.S.C. § 1291 is a question of federal, not state, law" (citation omitted)); *United States v. Vasquez-Balandran*, 76 F.3d 648, 649-650 (5th Cir. 1996) (in deciding whether a prior conviction is a crime of violence under 18 U.S.C. § 2L1.2(b)(2), "federal law rather than state law applies," and therefore "the distinction made by the Texas courts is not controlling"); *United States v. Lopez*, 710 F.2d 1071, 1073-74 (5th Cir. 1983) (whether federal officer's arrest and detention of suspect was in the performance of his "official duties" within the meaning of 18 U.S.C. § 11 "is determined by federal, not state, law"). Additionally, the time in which to file a petition for writ of certiorari is determined by the date on which the lower court's judgment is entered, not the date of mandate. SUP. CT. R. 13.3. Moreover, in determining retroactive application of new rules of law, this Court has held that a state conviction becomes final "when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally decided." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).

> either rejects the petition for certiorari or rules on its merits. If the conviction does not become final by the conclusion of direct review, it becomes final by "the expiration of the time for seeking such review." We previously held that this includes the ninety days allowed for a petition to the Supreme Court following the entry of judgment by the state court of last resort. If the defendant stops the appeal process before that point, the conviction becomes final when the time for seeking further direct review in the state court expires. This holding is consistent with our previous decision in *Flanagan* [*v. Johnson*, 154 F.3d 196, 197 (5th Cir. 1998)], where finality was established by the expiration of the ninety-day period to seek further review with the Supreme Court, rather than the date the conviction became final for purposes of state law.

Roberts v. Cockrell, 319 F.3d at 694 (footnotes omitted).

Determining the nature, extent, and procedural rules surrounding direct review or collateral review under state law necessarily requires a federal court to resort to state law. *Evans v. Chavis*, 126 S. Ct. 846 (2006); *Carey v. Saffold*, 536 U.S. 214 (2002); *Salinas v. Dretke*, 354 F.3d 425, 430 n.5 (5th Cir. 2004). However, that does not mean that a federal court must determine whether a conviction is final for state law purposes and utilize that state law determination to ascertain the answer to the unrelated question of whether the conviction is final under the language of § 2244(d)(1)(A). To do so would be contrary to *Clay*. The federal statute itself declares what makes a judgment final, which is the conclusion of direct review or the expiration of time for seeking such review.

Consequently, in *Roberts*, the Fifth Circuit held that when there is no petition for discretionary review filed after a court of appeals issues an opinion, the conviction is final when the time expires for

filing a petition for discretionary review, which is thirty days after the court of appeals issued the opinion. *Roberts v. Cockrell*, 319 F.3d at 694-95.

In Texas, direct review does not end with the intermediate state court of appeals. Additional review is available in the Texas Court of Criminal Appeals. TEX. CONST. art. V, § 5; TEX. CODE CRIM. PROC. art. 4.04, § 2; TEX. R. APP. P. 66.1. In the present case, Flores had thirty days in which to seek review from the Court of Criminal Appeals after the state court of appeals issued its opinion. TEX. R. APP. P. 68.2(a). As the Fifth Circuit correctly held, pursuant to *Roberts*, the time for seeking such review expired thirty days after the state court of appeals issued its opinion. The judgment became final at that point for purposes of the AEDPA, and the federal AEDPA limitations period began then. No additional direct review was available.

Because there is no clear circuit conflict, and because the Fifth Circuit was correct in *Roberts*, there is no compelling reason warranting review, and certiorari should be denied.

II. The Second Question Presented for Review — Whether the Court below Correctly Held That Flores Was Not Entitled to Equitable Tolling — Is Unworthy of the Court's Attention.

Flores contends he should have received equitable tolling of the AEDPA statute of limitations. Flores has not shown any compelling reason for review of this ground.

The Fifth Circuit, as do the other circuits, recognizes that the AEDPA statute of limitations can be equitably tolled, but only in rare and exceptional circumstances. *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). This Court has never held that equitable tolling applies to the AEDPA statute of limitations, but because litigants have assumed it applies, this Court has similarly assumed

so, without deciding the question. *See Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1814 n.8 (2005). "Equitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace v. Kato*, 127 S.Ct. 1091, 1100 (2007). To show entitlement to equitable tolling, a litigant must demonstrate "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007), quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

Here, the Fifth Circuit reviewed the equitable tolling issue for an abuse of discretion. PA 3a.

As the Fifth Circuit observed in the *Flores* and *Roberts* opinions, there was a split among the federal district courts in Texas regarding when convictions became final. PA 4a; *Roberts v. Cockrell*, 319 F.3d 694 n. 18; *see Mott v. Johnson*, No. 3:01-CV-0171-R, 2001 WL 671476, at * 2 (N.D.Tex. June 12, 2001) (stating that petitioner's conviction became final thirty days after court of appeals rendered judgment). *But see Royale v. Johnson*, No. 3:01-CV-1063-X, 2001 WL 1148946, at *3 (N.D.Tex. Sept.18, 2001) (stating that "finality of a judgment is determined pursuant to state law" which holds that judgment does not become final until mandate has issued); *Howard v. Johnson*, No. 3:00-CV-2032-P, 2001 WL 720489, at *2 (N.D.Tex. June 21, 2001)(same); *Rose v. Johnson*, No. 3:01-CV-0386-M, 2001 WL 880689, at *1 (N.D.Tex., June 21, 2001)(same); *Hunt v. Johnson*, No. 3:01-CV-0578-M, 2001 WL 484191, at *1 (N.D.Tex., May 3, 2001) (same).

There was also a conflict among circuits as to whether state or federal law controlled the question of finality. *See Wixom v. Washington*, 264 F.3d 894, 897-98 (9th Cir.2001) (rejecting, for purposes of § 2244(d)(1)(A), use of Washington state law which

views issuance of mandate as making conviction final); *Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir.2001) (holding that under Florida law, issuance of mandate on direct appeal makes criminal judgment final, and that that date will be used for purposes of § 2244(d)(1)(A)).

Therefore, before Flores's federal limitations period expired on September 22, 2001, there was authority similar in character to, but contrary to the legal holding of, the cases relied on by this district court to show that Flores's attorney followed federal law at the time in ascertaining the beginning of the federal limitations period. At best for Flores, there was a split in authority at that time.

In *Fierro v. Cockrell*, 294 F.3d 674 (5th Cir. 2002), the petitioner claimed that he believed that the AEDPA one-year limitations period did not apply to successive habeas petitions and he also believed that filing a petition for certiorari to the United States Supreme Court from the denial of his state habeas petition tolled the limitations period. *Id.* at 682. The petitioner argued that he was entitled to equitable tolling because his untimely filing was based on an interpretation of the AEDPA statute of limitations that was reasonable at the time but that was later determined to be incorrect. *Id.* at 683. The Fifth Circuit reiterated that "a lack of knowledge of the law, however understandable it may be, does not ordinarily justify equitable tolling." *Id.* That court further explained:

> Although the application and interpretation of the AEDPA statute of limitations was somewhat unsettled during this period, we think that such uncertainty should have militated against taking an unnecessary risk by waiting to file a motion for authorization and habeas petition. Given the nature of the interests at stake, it seems to us that it was incumbent upon counsel to err on the side of caution and file Fierro's petition within the most conservative of

> possible deadlines under the statute. In short, counsel's erroneous interpretation of the statute of limitations provision cannot, by itself, excuse the failure to file Fierro's habeas petition in the district court within the one-year limitations period.

Id.

As with *Fierro*, prudence would have dictated that the earlier beginning point be used in Flores's situation until the matter was settled. There was no practical reason for not doing so, and there was a risk of being time-barred for not doing so. In the present case, the Fifth Circuit correctly held that "Flores should have elected to err on the side of caution and abide by the earlier of the two possible deadlines." *Flores*, slip op. at 5. "Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel." *Lawrence v. Florida*, 127 S. Ct. at 1085.

Flores argues that if he filed his state writ application before the mandate issued, it would have been dismissed as premature. That is correct. *Ex parte Johnson*, 13 S.W.3d 472 (Tex. Crim. App. 2000). However, once mandate issued, Flores could have then filed his state writ application. As the Fifth Circuit observed, ten months still remained in the AEDPA limitations period at that point. Moreover, the pendency of a state writ application, properly filed after the mandate had issued, would have statutorily tolled the limitations period. 28 U.S.C. § 2244(d)(2); *Artuz v. Bennett*, 531 U.S. 4, 8 (2000).

Flores maintains that he was entitled to one year in which to file his federal writ petition, not ten months. However, Flores had one year from the expiration of time for seeking further direct review from the Court of Criminal Appeals. His only problem was that he could not file a state writ application for the first three months of

that one-year period. It did not mean he could not prepare, or begin to prepare, his state writ application during that time. In fact, Flores did not file his state writ application until almost one year after mandate issued. Nothing prevented him from filing it sooner.

Flores argues that this Court observed in *Day v. McDonough*, 126 S.Ct. 1675 (2006), that a federal district court has the discretion to decide whether the administration of justice is better served by dismissing a case on statute of limitations grounds or by reaching the merits of a petition. However, that was in the context of whether a district court had authority to consider *sua sponte* the timeliness of a federal petition. In that context, the Respondent argued in *Day* that when the government does not raise a statute of limitations issue, the district court may raise the matter *sua sponte* and dismiss the petition as untimely or reach the merits of the petition, deciding in the court's discretion whether justice is better served by one or the other. *Id.* at 1683. This Court ultimately agreed. *Id.* However, this Court did not hold that a district court has discretion whether to enforce the AEDPA statute of limitations when the issue is raised by the government.[7]

Because the district court's rationale for granting equitable tolling was flawed, the Fifth Circuit correctly held that court abused its discretion.

More significantly, the Fifth Circuit's application of equitable principles to Flores's fact situation provides no compelling reason for review.

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[7] Here, the Respondent raised the statute of limitations in the district court. *See cert pet.* at 5; PA 2a.

CONCLUSION

For the foregoing reasons, this Court should deny Flores's petition for writ of certiorari.

Respectfully submitted,

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